Supreme Court, U. S.
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NO. 80-407

In the Supreme Court of the United States

OCTOBER TERM, 1980-1981

JACK THOMPSON,
PETITIONER-PLAINTIFF

VERSUS

DAN H. TURNER, ASSISTANT DIRECTOR,
ALABAMA STATE HIGHWAY DEPARTMENT,
RESPONDENT-DEFENDANT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT DAN H. TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The questions for which Petitioner (hereafter referred to as "Thompson") seeks review have never been properly raised, litigated and passed upon by the courts below. Moreover, an answer to the questions presented is not necessary to a proper decision of the case and an answer will not affect the substantial rights of the parties.

ARGUMENT

A. *General Principles*

Turner believes that several general principles of law declared by this Court regarding its discretionary jurisdiction by way of certiorari are applicable to each of the three issues for which Thompson seeks review. These general principles are:

1. Certiorari will not issue to review a decision of a Court of Appeals where the matter complained of does not affect the substantial rights of the parties. *Smith v. Vulcan Iron Works*, 165 U.S. 518, 41 L.Ed. 810, 17 S.Ct. 407.

2. Certiorari will not issue to answer questions based upon a state of facts not present in the case or which are not necessary to a decision of the case. *General Talking Pictures Corp. v. Western Electric Co.*, 305 U.S. 124, 83 L.Ed. 81, 59 S.Ct. 355; *Minnesota v. National Tea Co.*, 309 U.S. 551, 84 L.Ed. 920, 60 S.Ct. 676.

3. Certiorari will not issue to consider questions which have not been properly raised, litigated and passed upon in the

lower courts. *McCullough v. Kammerer Corp.*, 323 U.S. 327, 89 L.Ed. 273, 65 S. Ct. 297.

4. Certiorari will not issue to consider claims not made out below. *Michel v. Louisiana*, 350 U.S. 91, 100 L.Ed. 83, 76 S.Ct. 158.

B. *Question 1: Damages after posttermination reinstatement.*

Thompson seeks to have this Court decide whether a claim for damages exists based upon a theory for which he did not seek damages in the Courts below.

Thompson concedes that while his complaint alleged facts concerning certain procedural deficiencies surrounding his termination of employment, such allegations were made to support a claim for damages based upon arbitrary and capricious treatment and that he made no claim at the trial court level for damages based upon *procedural* due process deprivations. 1

Thompson further agrees with Turner that the Court of Appeals mistakenly considered those allegations as attempting to state a claim for damages based upon a procedural due process denial. 2

When this case was tried in October, 1976, the trial court instructed the jury that Thompson could recover damages upon

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1 Petition for Writ of Certiorari, p. 5, footnote 9.

2 Id.

proof of two separate theories of recovery:

(1) that Turner acted to punish Thompson for the exercise of his first amendment right, and

(2) that Turner arbitrarily and capriciously deprived him of his employment with the State.[3]

Thompson took no exception to the court's charge and asked for no charge concerning a claim for damages based upon a denial of procedural due process.[4]

Upon appeal from a jury verdict in favor of Thompson, Turner contended that Thompson's complaint failed to state a claim for relief.[5] Although the Court of Appeals mistakenly considered Thompson's complaint to attempt to state a claim for damages on procedural due process grounds, that Court's decision with respect to such a claim was unnecessary to a proper decision of the appeal. The Court of Appeals found that the evidence was insufficient to support the verdict on the two claims actually prosecuted by Thompson -- the first amendment claim and the substantive due process claim.

For this reason, it cannot be said that the Court of Appeals has "departed from the accepted and usual course of

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[3] Record, pp. 920-937.

[4] Record, pp. 937-938.

[5] *Thompson v. Bass*, 616 F.2d 1259 (5th Cir. 1980) at p. 1263.

judicial proceedings." [6] Even if it did there was no injury to Thompson since he never asserted such a claim for damages in the first place.

In a similar vein, certiorari should not issue because of the applications of the general principles cited in Section A above. Thompson now seeks to have this Court answer whether he may maintain an action for damages upon a theory which he chose not to pursue in the lower courts, a theory of the case which was not properly raised, litigated and passed upon the Courts below. Moreover, an answer from this Court to the issue presented for review would not affect the substantial rights of the parties. Even if this Court were to hold that there is a viable procedural due process damage claim available in the context of the question presented, it would avail Thompson nothing since he has never made or prosecuted such a claim.

C. *Question 2: The burden of proof.*

The Court should decline certiorari on this issue for the same reasons. Indeed, there is no error in the record for the Court to review.

The question presented relates only to Thompson's substantive due process claim. That claim was that Turner's decision to dismiss Thompson was made arbitrarily, capriciously and maliciously and based on information that Turner knew was false. [7]

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6 Rule 17.1(a), Rules of the Supreme Court of the United States.

7 *Thompson v. Bass, supra,* at p. 1267.

The trial court instructed the jury that Thompson had a constitutional quaranty not to be deprived of his tenured job by arbitrary and capricious action, and that Thompson had the burden of proving the essential elements of his case which were: (1) that the acts complained of were done under color of state law, (2) that the acts complained of must have caused the deprivation of a right secured by the Constitution, and (3) the acts complained of must have caused injury or damage. The Court also charged that Turner could not be held liable if he acted reasonably and in good faith. [8]

As mentioned previously, Thompson took no exceptions or objections to the court's charge.

Turner made no claim of error in the Court of Appeals with respect to the trial court's charge on burden of proof, nor did Thompson.

No issue regarding the burden of proof was presented before either the District Court or the Court of Appeals. There was nothing for the Court of Appeals to review in that regard.

Thompson has misconstrued the opinion of the Court of Appeals. That court was not presented with an issue regarding the burden of proof, but rather one of whether Turner's motion for judgement notwithstanding the verdict should have been granted. In evaluating that issue the Court of Appeals was governed by its decision in *Boeing Company v. Shipman*, 411

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[8] Record, pp. 920-937.

F.2d 365 (5th Cir. 1969), under which the inquiry is whether, considering all the evidence, reasonable men could not have returned a verdict against Turner on the issues submitted to them.

The Court of Appeals, upon consideration of all the evidence given on both sides of the case, concluded that reasonable men could not on the basis of such evidence have returned a verdict against Turner. The language in the opinion that "Thompson failed to prove" in not, therefore, responsive to an issue of who had the burden of proof, but rather is indicative that from a consideration of all evidence given at trial the Court of Appeals concluded that "the facts and inferences point so strongly and overwhelmingly in favor of [Turner] that . . . reasonable men could not arrive at a contrary verdict." [9]

As neither the District Court nor the Court of Appeals has addressed the question sought to be reviewed, there is nothing for this Court to review.

Even if this Court were to answer the question that the burden was on Turner to prove that his actions were taken in good faith, the Court of Appeals decision would have to stand since under its standards it found from all the evidence presented by both sides that reasonable men could not have found against Turner.

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9 *Boeing Company v. Shipman*, supra, at 374.

D. *Question 3: The two separate claims.*

The question as presented for review is one which, if properly before the Court, we would concede must be answered in the affirmative. However, this question, like the two questions previous, is not properly before the Court.

In the pretrial order entered in September, 1976, one month before trial, plaintiff's contentions were stated to be that as a result of his talking with *the Birmingham News* Reporter the defendants "embarked upon a scheme to arbitrarily and capriciously deny [him] his constitutional rights guaranteed to him by the FOURTEENTH AMENDMENT and to punish him for exercising his rights guaranteed to him by the FIRST AMENDMENT" and that in furtherance of such scheme defendants accorded him disparate treatment and concocted false charges of dismissal against him. 10

Thus it was Thompson's theory, not the theory of the District Court or the Court of Appeals, that the alleged disparate treatment and termination of employment based on false charges was based upon either a conspiracy to deprive him of his right to due process and/or a conspiracy to punish him for talking to the reporter.

Thompson tacitly concedes that the Court of Appeals may not be reversed for finding that he failed to prove his First Amendment theory. Rather, Thompson is now attempting to

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10 Record, pp. 475-479.

change the nature of his substantive due process theory.

Thompson's substantive due process case as submitted to the jury was that Turner arbitrarily and capriciously terminated his employment with the State based upon known false charges. [11]

The question presented is not properly before this Court because:

(a) the Court of Appeals found that the evidence was insufficient to establish that Turner knew or suspected that the charges were false or unreasonable or that Turner's decision to dismiss him was arbitrary or capricious. [12] Such a finding necessarily resulted in a failure of the evidence to sustain Thompson's substantive due process claim, even without consideration of the allegation that Thompson's dismissal was motivated by a desire to punish for exercise of First Amendment rights;

(b) Thompson chose to allege as part of his contentions that the alleged arbitrary and capricious dismissal was because of a desire to punish for First Amendment reasons. [13] The Court of Appeals opinion merely recognizes that this was his contention and that it, too, was not proven. The opinion does not make punishment for exercise of First Amendment rights a condition precedent to recovery for violation of due process

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[11] *Thompson v. Bass, supra,* at p. 1267.

[12] Id., at p. 1268.

[13] See Footnote, 10, *supra.*

rights. The opinion merely responded to Thompson's theory of the case;

(c) in his petition, Thompson has sought to change his substantive due process theory as presented at the District Court and Court of Appeals levels from one based upon arbitrary and capricious denial of employment to a more general one of "disparate treatment". [14] Why he chooses to do so we cannot imagine since this "disparate treatment" theory was not raised or litigated below other than in the context of being the alleged actions taken to punish for Thompson's exercise of First Amendment rights. Also, mere disparate treatment, regardless of how arbitrary or capricious, could never rise to the level of a deprivation of due process rights unless it amounted to either an injury to the "liberty" or "property" interests of the complaining party. Thompson has never claimed that the mere "disparate treatment" deprived him of his "liberty" or "property" interests.

Consequently, the Court of Appeals has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" [15], but rather has only held that Thompson failed to prove his case in the context of his own theories and allegations. The Court of Appeals cannot be held in error for so doing.

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[14] Petition for Writ of Certiorari, pp. 31-32.

[15] Rule 17.1(a), Rules of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons, Turner respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing brief upon Hon. Alvin T. Prestwood, P.O. Box 217, Montgomery, Alabama, 36101, Attorney of Record for Petitioner, by United States Mail, postage prepaid and properly addressed, on this the 14TH day of October, 1980.

/S/ Robert S. Lamar, Jr.
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